

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARIO V. VENTURA,

Plaintiff,

vs.

KEVIN POUGH, et al.,

Defendants.

No. C 05-01814 JF (PR)

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT**

(Docket No. 42)

Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint on May 2, 2005, pursuant to 42 U.S.C. § 1983 against Menlo Park Police Officers Kevin Pough and Joseph Hinkston, the Menlo Park Police Chief, and the City of Menlo Park. On May 1, 2008, this Court found that Plaintiff's original complaint stated a cognizable claim of excessive force in violation of the Fourth Amendment and issued an order of service on the named Defendants.¹ Defendants filed a motion for summary judgment on July 23, 2008, on the grounds that: (1) Plaintiff has not

¹ Plaintiff attempted to file an amended complaint, which the Court denied. The Court ordered service of the original complaint after Plaintiff failed to file a second amended complaint.

1 established that Defendants used excessive force in violation of the Fourth
2 Amendment; and (2) Defendants are entitled to qualified immunity. Plaintiff did not
3 file an opposition. After reviewing the motion, the Court concludes that Defendants
4 are entitled to summary judgment and will GRANT Defendants' motion as to all
5 claims.

6 7 DISCUSSION

8 I. Standard of Review

9 Summary judgment is proper where the pleadings, discovery and affidavits
10 show that there is "no genuine issue as to any material fact and [that] the moving
11 party is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(c). Material
12 facts are those that may affect the outcome of the case. See Anderson v. Liberty
13 Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if
14 the evidence is such that a reasonable jury could return a verdict for the nonmoving
15 party. See id.

16 The court will grant summary judgment "against a party who fails to make a
17 showing sufficient to establish the existence of an element essential to that party's
18 case, and on which that party will bear the burden of proof at trial... since a complete
19 failure of proof concerning an essential element of the nonmoving party's case
20 necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S.
21 317, 322-23 (1986); see also Liberty Lobby, 477 U.S. at 248 (holding a fact is
22 material if it might affect the outcome of the suit under governing law, and that a
23 dispute about a material fact is genuine "if the evidence is such that a reasonable
24 jury could return a verdict for the nonmoving party"). The moving party bears the
25 initial burden of identifying those portions of the record which demonstrate the
26 absence of a genuine issue of material fact. See Celotex Corp., 477 U.S. at 323.
27 Where the moving party will have the burden of proof on an issue at trial, it must
28 affirmatively demonstrate that no reasonable trier of fact could find other than for

the moving party. But on an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out “that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325. If the evidence in opposition to the motion is merely colorable, or is not significantly probative, summary judgment may be granted. *See Liberty Lobby*, 477 U.S. at 249-50.

The burden then shifts to the nonmoving party to “go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex Corp.*, 477 U.S. at 324 (citations omitted). If the nonmoving party fails to make this showing, “the moving party is entitled to judgment as a matter of law.” *Id.* at 323.

In considering a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party; if, as to any given fact, evidence produced by the moving party conflicts with evidence produced by the nonmoving party, the court must assume the truth of the evidence set forth by the nonmoving party with respect to that fact. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999). The court’s function on a summary judgment motion is not to make credibility determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W. Elec. Serv. V. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

II. Legal Claims and Analysis

A. Individual Liability

Defendants Hinkston and Paugh assert that they are entitled to qualified immunity from Plaintiff’s claim that they used excessive force in violation of the Fourth Amendment. Under *Saucier v. Katz*, 533 U.S. 194 (2001), the court must undertake a two-step analysis when a defendant asserts qualified immunity in a motion for summary judgment. The court first faces “this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show

1 the officer's conduct violated a constitutional right?" 533 U.S. at 201. If the court
2 determines that the conduct did not violate a constitutional right, the inquiry is over
3 and the officer is entitled to qualified immunity.

4 If the court determines that the conduct did violate a constitutional right, it
5 then moves to the second step and asks "whether the right was clearly established"
6 such that "it would be clear to a reasonable officer that his conduct was unlawful in
7 the situation he confronted." Id. at 201-02. Even if the violated right was clearly
8 established, qualified immunity shields an officer from suit when he makes a
9 decision that, even if constitutionally deficient, reasonably misapprehends the law
10 governing the circumstances he confronted. Brosseau v. Haugen, 543 U.S. 194, 198
11 (2004); Saucier, 533 U.S. at 205-06. If "the officer's mistake as to what the law
12 requires is reasonable... the officer is entitled to the immunity defense." Id. at 205.

13 Under the Fourth Amendment, officers may only use such force as is
14 "objectively reasonable" under the circumstances. Graham v. Connor, 490 U.S. 386,
15 397 (1989). To determine whether the force used was reasonable, courts balance the
16 nature and quality of the intrusion on the individual's Fourth Amendment interests
17 against the countervailing governmental interests at stake. Id. at 396. The
18 "reasonableness" of a particular use of force must be judged from the perspective of
19 a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Id.
20 Because the reasonableness test is not capable of precise definition or mechanical
21 application, its practical application requires careful attention to the facts and
22 circumstances of each particular case, including "the severity of the crime at issue,
23 whether the suspect poses an immediate threat to the safety of the officers or others,
24 and whether he is actively resisting arrest or attempting to evade arrest by flight."
25 Id.

26 In addition, the court's consideration of "reasonableness must embody
27 allowance for the fact that police officers are often forced to make split-second
28 judgments – in circumstances that are tense, uncertain, and rapidly evolving – about

1 the amount of force that is necessary in a particular situation.” Id. at 396-97. Nor
2 every push or shove, even if it may later seem unnecessary in the peace of a judge’s
3 chambers, violates the Fourth Amendment. Id. at 396.

4 Defendants submitted the declaration of Officer Paugh and documentary
5 evidence showing the following facts: On the date of the incident, February 20,
6 2005, Plaintiff was identified as driving a stolen vehicle. Officer Hinkston was the
7 first to spot the stolen vehicle, and Officer Paugh came to his assistance in the
8 pursuit. Plaintiff did not stop when both officers activated their emergency lights
9 and sirens. Instead, he “accelerated, failing to stop at several stops signs and driving
10 at approximately 55 miles per hour on residential streets.” (K. Paugh Decl. at 2.)
11 Plaintiff eventually slowed and stopped the car, but instead of fleeing immediately
12 on foot as expected, he stayed in the vehicle for several seconds, “reaching around
13 inside.” (Id.) Officer Paugh feared that Plaintiff “might be reaching for a weapon.”
14 (Id.) The officers exited their patrol cars as Plaintiff began to flee on foot. As
15 Plaintiff ran past Officer Paugh, he noticed that Plaintiff was carrying a “large black
16 object in his left hand.” (Id.) Plaintiff was running much faster than either Officer
17 Paugh or Hinkston could run. Officers ordered Plaintiff to stop running, but he did
18 not. Officer deployed his K-9 partner, Zin, with the order “to apprehend” the fleeing
19 Plaintiff. (Id.) Zin caught up with Plaintiff and “engaged him by biting him on the
20 upper portion of his left leg, immediately knocking [Plaintiff] to the ground.” (Id.)
21 Plaintiff struggled and attempted to get up, at which point Zin “lost his grip” and
22 “had to re-engage [Plaintiff] by biting his upper right leg.” (Id.) Meanwhile, the
23 officers caught up with Plaintiff as he continued to struggle with Zin. “Fearing that
24 [Plaintiff] had a weapon,” Officer Hinkston drew his firearm and pointed it at
25 Plaintiff, instructing him “to turnover and put his hands behind his back.” (Id. at 3.)
26 Plaintiff refused. Officer Paugh “assisted” Plaintiff in turning over and placed
27 handcuffs on him. (Id.) Once Officer Paugh had the handcuffs on Plaintiff, he
28 instructed Zin to release his hold, which he did. Paramedics arrived at the scene in

1 response to Officer's Paugh's call to treat Plaintiff's several dog bite wounds.
2 Plaintiff was taken to Stanford Hospital for further treatment.

3 Under the circumstances described by Defendants, the force used by officers
4 to apprehend and secure Plaintiff was objectively reasonable. See Mendoza v.
5 Block, 27 F.3d 1357, 1362-63 (9th Cir. 1994).² In Mendoza, the plaintiff was
6 severely bitten by a police dog while trying to evade arrest for bank robbery. He
7 sued the arresting officers alleging that they used excessive force to arrest him. The
8 Ninth Circuit disagreed:

9 Mendoza was fleeing arrest for a bank robbery, a felony. The
10 deputies believed he was armed, due to radio broadcasts from
11 headquarters. Mendoza did not surrender when warned that he
12 would be bitten if he did not come out of the bushes. He was hiding
13 on private property and the deputies could reasonably believe he
14 posed a danger not only to themselves but also to the property
owners. He had not been subdued when the dog bit him the second
time. In fact, once he was out of the bushes, he struggled with the
dog, causing the dog to shift its bite. Using a police dog to find
Mendoza, and to secure him until he stopped struggling and was
handcuffed, was objectively reasonable under these circumstances.

15 Id. The same conclusion applies here: the officers believed that Plaintiff was in
16 possession of a stolen vehicle, that Plaintiff posed a threat to the public in leading
17 the police in a high speed care chase through residential streets, and that Plaintiff
18 was actively avoiding arrest. When Plaintiff finally did stop the vehicle, he did not
19 surrender but continued to flee on foot despite the warnings given by the officers.
20 Officers reasonably believed that Plaintiff may be armed because they saw him
21 reaching around the car before fleeing and he had a black object in his hand as he
22 ran past. Even after the K-9 knocked him down and bit him the first time, Plaintiff
23 continued to struggle, causing the K-9 to lose his grip and bite again. When Officer
24 Hinkston, reasonably fearing Plaintiff was armed, instructed Plaintiff to turnover and
25

26 ² While the test of reasonableness is often a question for the jury, this issue may be
27 decided as a matter of law if, in resolving all factual disputes in favor of the plaintiff, the
28 officer's force was "objectively reasonable" under the circumstances. Jackson v. City of
Bremerton, 268 F.3d 646, 651 n.1 (9th Cir. 2001); Scott v. Henrich, 39 F.3d 912,
915 (9th Cir. 1994).

put his hands behind his back, Plaintiff refused. Officer Paugh had to force Plaintiff to turnover and handcuff him before he could order the K-9 to release his hold. The officers' use of the police dog to apprehend Plaintiff and place him under control was objectively reasonable under these circumstances. Accord id.³

As noted, Plaintiff has not filed an opposition to the motion for summary judgment.⁴ Where the plaintiff does not file an opposition to a motion for summary judgment, but, as here, has verified his complaint, the Court treats the allegations in the verified complaint as an opposing affidavit to the extent such allegations are based on plaintiff's personal knowledge and set forth specific facts admissible in evidence. See Schroeder v. McDonald, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995). The allegations in Plaintiff's complaint suggests that Defendants used force after he was handcuffed; however, the allegations are largely conclusory and insufficient to create a genuine issue for trial because they do not show that, contrary to Defendants' evidence, Defendants used force after Plaintiff had stopped resisting arrest. See also First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 289 (9th Cir. 2001) ("party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him"). Plaintiff's

³ Mendoza and this case are distinguishable from Smith v City of Hemet, 394 F.3d 689 (9th Cir. 2005), where the Ninth Circuit found that a jury could conclude that the use of force comprised of a police dog, pepper spray and physical force was excessive. In Smith, unlike Mendoza and this case, there was no basis to warrant the conclusion that the plaintiff was a particularly dangerous criminal, the plaintiff resisted arrest only for a very brief period and, importantly, plaintiff set forth facts showing that significant force (including sliding plaintiff off the porch face down and pepper spraying him repeatedly) was used after he had clearly stopped resisting arrest.

⁴ Plaintiff was advised pursuant to Rand v Rowland, 154 F.3d 952 (9th Cir. 1998) (en banc), that to prevent summary judgment in favor of defendants he "must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradicts the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial." May 1, 2008 Order at 4. (quoting Rand, 154 F.3d at 962-63). "If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you." Id.

conclusory statements that “at no time did [he] try to resist,” (Pl.’s Decl. at 2), and that “during the time [he] suffered most wounds, [he] was lying on [his] back surrend[er]ed and cuffed,” (Id. at 4), are not enough to defeat summary judgment. See e.g., Arpin v. Santa Clara Valley Transportation Agency, 261 F.3d 912, 922 (9th Cir. 2001) (plaintiff’s conclusory statement that she “did not resist arrest in any way” insufficient to defeat summary judgment).

Defendants are entitled to summary judgment based on Plaintiff’s failure to meet his burden of proof under Celotex and show that there is a genuine issue for trial on his claim of excessive force during arrest. See Arpin, 261 F.3d at 922. The officer defendants are also entitled to qualified immunity because, even if the use of force amounted to a constitutional violation, a reasonable officer could properly believe that the use of force under these circumstances in this case would not violate a clearly established constitutional right. See Saucier, 533 U.S. at 201-02; Jackson, 268 F.3d at 653 n.5.

B. Municipal Liability

Plaintiff alleges that the City of Menlo Park (“the City”) and the chief of police⁵ of the Menlo Park Police Department (“the Department”) have violated his constitutional rights by maintaining a “policy, regulation, custom or regulation” that was the “moving force” behind his unconstitutional injuries. (Pl.’s Decl. at 4.)

To impose municipal liability under § 1983 for a violation of constitutional rights, a plaintiff must show: (1) that the plaintiff possessed a constitutional right of which he or she was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff’s constitutional rights; and (4) that the policy is the moving force behind the constitutional violation. See

⁵ The chief of police is named as a defendant in this action, but there is no individual liability under a Monell claim. Furthermore, under no circumstances is there respondeat superior liability under section 1983. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

1 Plumeau v. School Dist. #40 County of Yamhill, 130 F.3d 432, 438 (9th Cir. 1997).
2 However, a city or county cannot be liable for damages based on the actions of one
3 of its employees unless the employee inflicted constitutional harm. See City of Los
4 Angeles v. Heller, 475 U.S. 796, 799 (1986); Quintanilla v. City of Downey, 84 F.3d
5 353, 355 (9th Cir. 1996); Scott v. Henrich, 39 F.3d 912, 916 (9th Cir. 1994). This
6 does not mean that the liability of municipalities or counties turns on the liability of
7 individual employees; rather, "it is contingent on a violation of constitutional
8 rights." Scott, 39 F.3d at 916. Therefore, where the conduct of individual
9 employees is found reasonable and proper, the municipality or county cannot
10 generally be held liable, because no constitutional violation occurred. See Gregory
11 v. County of Maui, 523 F.3d 1101, 1109 (9th Cir. 2008) (where officers did not use
12 excessive force in violation of 4th Amendment, claims against the county also fail).
13 Here, Plaintiff has failed to show that there is a genuine issue of material fact with
14 respect to the liability of defendant officers for their alleged use of excessive force.
15 Therefore, the City and Department cannot be held liable for damages where no
16 constitutional violation has occurred. Id. Accordingly, the City and the Department
17 are entitled to summary judgment on Plaintiff's claims.

CONCLUSION

20 For the foregoing reasons, Defendants' motion for summary judgment is
21 GRANTED. The Clerk of Court shall terminate Docket No. 42, enter judgment and
22 close the file.

23 **IT IS SO ORDERED.**

24 DATED: 9/3/08


JEREMY FOGEL
United States District Judge